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U.S. Citizenship
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Services

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DA

MAR 03 2005

FILE: WAC 03 031 50045 Office: CALIFORNIA SERVICE CENTER Date:


IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be dismissed.

The petitioner is an engineering and construction company that seeks to employ the beneficiary as an in-house accountant. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(15)(H)(i)(b). The director denied the petition on the basis that the proffered position did not meet the definition of a specialty occupation. The AAO affirmed the director's findings.

The service center erred when it rejected the motion because it was filed on a Form I-290A, and therefore, as counsel asserts, the filing was effected on the date when the service center first received the motion.¹ Accordingly, the motion was timely filed, in accordance with the requirements of 8 C.F.R. § 103.5(a)(1)(i). The motion, however, does not meet the substantive requirements of 8 C.F.R. §§ 103.5(a)(2) and (3).

On motion, counsel requests that the AAO reconsider and reverse its earlier decision on the basis that the petitioner has established that the proffered position is that of an accountant. Counsel states that the AAO erred "by concluding without basis that the proffered position is not a specialty occupation [accountant position] but rather a bookkeeper position." Counsel asserts that the petitioner "is seeking to employ the beneficiary as an accountant (see DOT 160.162-018) and the duties described are the duties of an accountant." Counsel includes evidence not earlier presented, namely, an excerpt on the accountant occupation from the Department of Labor's *Dictionary of Occupational Titles* (DOT).

Counsel's assertions and submission of additional evidence do not satisfy either the requirements of a motion to reopen or a motion to reconsider.

A motion to reopen must state the new facts to be provided in the reopened proceeding, and it must be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Generally, the new facts must be material and unavailable previously, and such that they could not have been discovered earlier in the proceeding. See 8 C.F.R. § 1003.23(b)(3). As the DOT is available to the general public, the DOT excerpt does not meet this evidentiary category.

The matters filed as a motion also fail to satisfy the requirements of a motion to reconsider. A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Although counsel generally asserts legal

¹ In fact, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) specifies that a motion to reconsider or reopen "shall be submitted on Form I-290A." A motion should not be rejected for failure to use that particular form, however, as the form has not been produced for use. See the listing of CIS forms at <http://onlineplus.ins/graphics/formsfee/forms/index.htm>.

error by the AAO, he does not support his assertion by any pertinent precedent decisions, or establish that the director misinterpreted the evidence of record.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is dismissed.